

|                                |   |                          |
|--------------------------------|---|--------------------------|
| UNITED STATES OF AMERICA       | ) | Prosecution Motion       |
| v.                             | ) |                          |
| Manning, Bradley E.            | ) | for Reconsideration of   |
| PFC, U.S. Army,                | ) | Court's Finding in       |
| HHC, U.S. Army Garrison,       | ) | Appellate Exhibit LXVIII |
| Joint Base Myer-Henderson Hall | ) |                          |
| Fort Myer, Virginia 22211      | ) | 16 November 2012         |

### RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court reconsider its finding that the prosecution “disputed that it was obligated to disclose classified Brady information that was material to punishment only.” See Appellate Exhibit (AE) LXVIII, at ¶ 6; see also Brady v. Maryland, 373 U.S. 83, 87 (1973). The prosecution requests that the Court reconsider its finding before the parties present speedy trial arguments.

### BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by preponderance of the evidence. See Manual for Courts-Martial (MCM), United States, Rule for Courts-Martial (RCM) 905(c)(1) (2012). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. See RCM 905(c)(2).

### FACTS

On 8 March 2012, the prosecution filed its Response to the Defense Motion to Compel Discovery. See AE XVI. Therein, the prosecution stated, *inter alia*, that it intended to produce discoverable information within the Federal Bureau of Investigation (FBI) files. The prosecution specifically stated that “[b]ased on the information being classified, the United States intend[ed] to produce any information within the FBI’s investigative files that is discoverable under Brady[.]” Id., at 8. The prosecution defined Brady to include “evidence that is favorable to an accused and that is material either to guilt or punishment.” Id., at 5.

During the Article 39(a) session on 15 March 2012, the prosecution confirmed its position that “the Constitutional rights under Brady always apply[,]” even when that information is classified. See Unauthenticated Transcription of Article 39(a) Session dated 15 March 2012, at 1:02:51-1:03:05 (stating that “Brady is never trumped”). The Court then explicitly asked the prosecution “what is the Government’s view of [] Brady?” Id., at 1:03:15-24. The Government responded that Brady includes, *inter alia*, “material that would tend to negate or minimize sentencing, well punishment, so it applies to sentencing information.” Id., at 1:04:02-14.

On 22 March 2012, the prosecution notified the Court that it had reviewed the classified Information Review Task Force damage assessment and that it found favorable material under Brady. See AE XXXVI, at 7. The prosecution indicated that the favorable material related to punishment. The prosecution, citing Brady, stated that it “[would] produce all evidence favorable to the accused that is material to guilt or to punishment.” Id. On 23 March 2012, the Court agreed that the “Government must disclose any favorable classified information from the damage assessments that is material to punishment.” Id.

On 12 April 2012, the prosecution filed its Response to the Defense Motion to Dismiss All Charges with Prejudice. See AE XLII. Therein, the prosecution confirmed that it “shall *always* produce Brady evidence.” Id. at 3.

On 25 April 2012, the Court found “that the Government properly understood its obligation to search for exculpatory Brady material, however, the Government disputed that it was obligated to disclose classified Brady information that was material to punishment only.” AE LXVIII, at ¶ 6.

### **WITNESSES/EVIDENCE**

The prosecution does not request any witnesses or evidence be produced for this motion. The prosecution requests that the Court consider the Appellate Exhibits and the Article 39(a) transcripts referenced herein.

### **LEGAL AUTHORITY AND ARGUMENT**

At the request of any party, “the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.” RCM 905(f). The prosecution requests that the Court reconsider its finding that the prosecution “disputed that it was obligated to disclose classified Brady information that was material to punishment only.” AE LXVIII, at ¶ 6. The record, both through written filings and oral argument, does not support this finding. Instead, the prosecution has consistently maintained that it shall always disclose classified Brady information, whether material to guilt or punishment.

The prosecution has consistently maintained that it “shall *always* produce Brady evidence,” even if classified. AE XLII, at 3; see also AE XVI, at 8 (stating that it would produce classified Brady material in the FBI files); AE XXXVI, at 7 (stating that it would produce classified Brady material in the IRTF damage assessment); Unauthenticated Transcription of Article 39(a) Session dated 15 March 2012, at 1:02:51-1:03:05 (stating that “Brady is never trumped”).

The prosecution has consistently defined Brady to include “evidence that is favorable to an accused and that is material either to guilt or punishment.” AE XVI, at 5; AE XXXVI, at 7; see also Unauthenticated Transcription of Article 39(a) Session dated 15 March 2012, at 1:04:02-14 (defining Brady to include, *inter alia*, “material that would tend to negate or minimize sentencing, well punishment, so it applies to sentencing information”).

## CONCLUSION

The prosecution respectfully requests that the Court reconsider its finding that the prosecution “disputed that it was obligated to disclose classified Brady information that was material to punishment only” because the record does not support this finding.



J. HUNTER WHYTE  
CPT, JA  
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 16 November 2012.



J. HUNTER WHYTE  
CPT, JA  
Assistant Trial Counsel